NO. 80-793

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS J. RODRIGUE, JR.

Respondent

VERSUS

DIXILYN CORPORATION

Petitioner

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

A) QUESTION PRESENTED

1) Did the United States Court of Appeals for the Fifth Circuit erroneously apply the law of the State of Louisiana in reviewing the jury charge delivered by the United States District Court for the Eastern District of Louisiana to the jury and the verdict returned by the jury in favor of the defendant?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Citations iii

Opinions Rendered 1

Statement of Jurisdiction 1

Statutes Involved 2

Statement of the Case 3

Argument in Support of Petition 4

Certificate of Service 9

Appendix ..... A-1 - A-18

TABLE OF CITATIONS

Page

CASES:

American Road Insurance Company v. Montgomery 354 So. 2d 656 (La. App. 1, 1977) 7

Bertrand v. Shell Oil Company 489 F. 2d 293 (5th Cir., 1973) 4

Carver v. City of Baton Rouge 348 So. 2d 708 (La. App. 1, 1977) 7

Cobb v. MFA Mutual Insurance Company 303 So. 2d 228 (La. App. 2, 1974) 4

Comeaux v. State Farm Mutual Insurance Co. 213 So. 2d 674 (La. App. 1, 1976) writ denied 235 So. 2d 96 4

Evans v. Chevron Oil Company 438 F. Supp. 1097 (E. D. La., 1977) 5

Loescher v. Parr 324 So. 2d 441 (La., 1975) 5, 6, 7

Moczygemba v. Danos & Curole Marine Contractors 561 F. 2d 1149 (5th Cir., 1977) 5

Olsen v. Shell Oil Company 365 So. 2d 1285 (La., 1978) 5, 6

TABLE OF CITATIONS CONTINUED

Page

Richards v. Marlow 347 So. 2d 281 (La. App., 1977) writ refused 350 So. 2d 671 (La., 1977) 7

Scott v. Continental Insurance Company 223 So. 2d 261 (La. App. 1, 1970) writ refused 236 So. 2d 37 4

Thompson v. Commercial National Bank 100 So. 688 (La., 1914) 6

Turner v. Aetna Casualty & Surety Company 175 So. 2d 304 (La. App. 2, 1965) 6

Weiss v. Lavigne 70 So. 103 (La., 1915) 6

STATUTES

33 U. S. C. §1333(2) (a) 2
43 U. S. C. §1331 1
L. S. A. - C. C. 2317 ..... 2, 3, 4, 5, 7
L. S. A. - C. C. 2311 ..... 5, 6

(A) OPINIONS RENDERED

This matter was tried to a jury and no written opinion was rendered in the United States District Court for the Eastern District of Louisiana. On July 3, 1980, the United States Court of Appeals for the Fifth Circuit rendered a written opinion overturning the judgment of the District Court. The opinion of the United States Court of Appeals for the Fifth Circuit is appended to this Petition.

(B) GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment sought to be reviewed was rendered by the United States Court of Appeals for the Fifth Circuit on July 3, 1980, reversing the judgment of the United States District Court for the Eastern District of Louisiana which was rendered on May 31, 1978.

(ii) Application for a panel rehearing was filed with the United States Court of Appeal for the Fifth Circuit on July 17, 1980. The application for rehearing was denied on August 20, 1980.

(iii) The instant litigation arises under Title 43 U. S. C. §1331, et. seq., Outer Continental Shelf Lands Act. Accordingly, the instant action presents a federal question and this Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U. S. C. §1254.

(C) QUESTION PRESENTED FOR REVIEW

The United States Court of Appeals for the Fifth Circuit held that the defendant was not entitled to the defense of contributory negligence, which acts to completely bar the plaintiff from recovery, and reversed the judgment of the United States District Court for the Eastern District of Louisi-

ana. At time of trial, May 1, 1978, it was the law of the State of Louisiana that the defense of contributory negligence completely barred recovery by the plaintiff. The United States Court of Appeals for the Fifth Circuit did not correctly apply the then prevailing law of the State of Louisiana to the case, but substantially altered and expanded the law of the State of Louisiana as supplied by Louisiana Civil Code Article 2317.

(D) STATUTES INVOLVED

This case involved the application of Title 33 U. S. C. §1333 (2) (a) of the Outer Continental Shelf Lands Act:

> "To the extent that are applicable and not inconsistent with this subchapter or with other federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed or declared to be the law of the United States for that portion of the subsoil and subsea of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the state if its boundaries were extended seaward to the outer margine of the Outer Continental Shelf, and the President shall determine and publish in the Federal Register which projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the Outer Continental Shelf."

The Law of the State of Louisiana which is applied to this matter is contained in Louisiana Civil Code Article 2317:

"We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or in the things which we have in our custody. This, however, is to be understood with the following modifications."

(E) STATEMENT OF THE CASE

On the night of February 29, 1976, the plaintiff was employed as an offshore oil field worker aboard the J. Ray McDermott Derrick Barge No. 17, then located in the Gulf of Mexico, off the coast of Louisiana. The plaintiff's employer, J. Ray McDermott & Company, contracted with Placid Oil Company to position the DIXILYN RIG No. 7 aboard a stationary platform owned by Placid Oil Company.

The plaintiff and other members of his crew were aboard the Placid Oil Company platform on the night of February 29, 1976, assisting in the lifting and positioning of the DIXILYN drilling rig onto the platform. While engaged in those activities, plaintiff fell into a hole located on the first deck of the drilling rig, sustaining injury to his right ankle.

The jury concluded that the plaintiff fell into an open hatch or hole which was a dangerous condition and that Dixilyn was negligent. However, the jury determined that the negligence of Dixilyn was not a proximate cause to the plaintiff's injury, that the plaintiff was negligent, and that his negligence was a proximate cause of his injury.

On July 3, 1980, the United States Court of Appeals for the Fifth Circuit reversed the District Court's judgment. That Court held that the defense of contributory negligence was not available to an action properly brought under Louisiana Civil Code Article 2317. That Court further held that the defendant was liable under Louisiana Civil Code Article 2317

to the plaintiff and remanded the matter to the District Court for a trial to address the plaintiff's injuries only.

On July 17, 1978, Dixilyn filed a Petition for Panel Rehearing, which was denied, without written opinion, on August 20, 1980.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FAILED TO APPLY THE CORRECT STANDARD OF LOUISIANA NEGLIGENCE LAW, BUT FASHIONED A NEW INTERPRETATION OF LOUISIANA CIVIL CODE ARTICLE 2317 PRECLUDING THE DEFENDANT OF A THEN AVAILABLE DEFENSE TO THE PLAINTIFF'S ACTION.

As previously noted, the plaintiff sustained injury while aboard a stationary platform on the Outer Continental Shelf, off the coast of Louisiana. The law of the State of Louisiana is applied as surrogate federal law in the plaintiff's suit against Dixilyn. *Bertrand v. Shell Oil Company*, 489 F. 2d 293 (5th Cir., 1973).

There is in Louisiana law a long line of cases which establish that a plaintiff may not recover in tort, regardless of the negligence on the part of the defendant, if the plaintiff's own negligence is a proximate cause of his injury. *Cobb v. MFA Mutual Insurance Company*, 303 So. 2d 228 (La. App. 2, 1974); *Scott v. Continental Insurance Company*, 223 So. 2d 261 (La. App. 1, 1970), writ refused 256 So. 2d 37 and *Comeaux v. State Farm Mutual Auto Insurance Company*, 231 So. 2d 674 (La. App. 1, 1970), writ denied 235 So. 2d 96. Further, the United States Court of Appeals for the Fifth Circuit has applied the Louisiana Doctrine of Contributory Negligence to torts which occurred on the Outer Continental Shelf,

thereby denying recovery to the plaintiff. ***Moczygemba v. Danos & Curole Marine Contrators***, 561 F. 2d 1149 (5th Cir., 1977) and ***Evans v. Chevron Oil Company***, 438 F. Supp. 1097 (E. D. La., 1977).

On December 8, 1975, the Louisiana Supreme Court handed down its opinion in the ***Loescher v. Parr*** case, 324 So. 2d 441 (La., 1975) In that case the Louisiana Supreme Court extended the Louisiana Delictual Fault Scheme to the provisions of Civil Code Article 2317. The Court held the owner-guardian of the defective thing, in that instance a tree, legally liable for damages caused by the defective thing ". . . unless he proved that the damage was caused by the fault of the victim, by the fault of a third person, or by an irresistible force". ***Supra.***, 449. The defendant contended that the plaintiff's damages were caused by an irresistible force, i. e. a high and gusty wind which blew down the tree, causing injury to the plaintiff. The Court held that this defense did not absolve the defendant of legal liability, since the wind did not constitute a fortuitous event. Contributory negligence of the plaintiff was not alleged by the defendant, and was not discussed in the opinion. However, in discussing the defense of "fault of the victim", the Court noted: "No showing is made that the fault of the victim or of any third party contributed to (i. e., was a substantial factor in) the fall of the tree." ***Supra.***, page 449.

Three years later the Louisiana Supreme Court decided, on certification from the United States Court of Appeals for the Fifth Circuit, the ***Olsen v. Shell Oil Company*** case. 365 So. 2d 1285 (La., 1978). In that case a living module atop a stationary platform on the Outer Continental Shelf off the coast of Louisiana exploded, causing personal injury to several plaintiffs. The Louisiana Supreme Court was asked to determine the liability of the platform owner, Shell Oil Company, pursuant to a Louisiana Civil Code Article 2322, which is a related Article to Civil Code Article 2317:

> "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction." L. S. A. C. C. 2322.

The living module in which the explosion occurred was not owned and operated by Shell Oil Company, but by an independent third party drilling contractor. The primary defense of Shell was that the proximate cause of the explosion was the fault of the third party drilling contractor. The Louisiana Supreme Court rejected that defense, holding that Shell, as the owner of the platform, had a non-delicable duty to keep its platform and appurtenances in proper repair so as to preclude an unreasonable risk of injury to others.

In neither the *Loescher* or *Olsen* decisions did the Louisiana Supreme Court directly discuss the defense of "fault of the victim". However, prior decisions of the Louisiana Supreme Court have recognized that the plaintiff's contributory negligence is a complete bar to his recovery. In the *Thompson v. Commercial National Bank* decision, 100 So. 688 (La., 1914), the plaintiff brought suit pursuant to Louisiana Civil Code Article 2322 against the owners of a building. That Court specifically noted that contributory negligence was a complete defense to the plaintiff's suit. A similar holding was delivered by the Louisiana Supreme Court in its *Weiss v. Lavigne* decision. 70 So. 103 (La., 1915).

At time of trial of this matter the Courts of Louisiana continued to hold the plaintiff's contributory negligence as a complete bar to his recovery. In the *Turner v. Aetna Casualty Company* case, 175 So. 2d 304 (La. App. 2, 1965), the plaintiff sustained injury when she fell into a hole on a porch floor. The plaintiff brought her action against the owner of the house under Louisiana Civil Code Article 2322, and others. Anticipating the defense of contributory negligence, that Court noted: "We may observe, however, that, as to the defense

urged here, negligence of the defendant is of no importance if plaintiff is guilty of contributory negligence constituting a proximate cause of the accident." *Supra.*, page 305.

Subsequent to the *Loescher* decision, the Courts of Louisiana continued to bar recovery to a contributorily negligent plaintiff. In the *Richards v. Marlow* decision, 347 So. 2d 281 (La. App. 2, 1977), writ refused, 350 So. 2d 671 (La., 1977), the Court determined that the plaintiff was contributorily negligent and had also assumed the risk of her action, thereby barring her recovery regardless of the initial negligence on the defendant's part. Likewise, the *Carver v. City of Baton Rouge* Court, 348 So. 2d 708 (La. App. 1, 1977), denied recovery to a plaintiff who sustained injury when she tripped on a public sidewalk. That Court specifically held that the plaintiff was not entitled to recovery from a defendant under the principles of Louisiana Civil Code Article 2317 as interpreted in *Loescher v. Parr, Supra.*, : "We do not reach this contention in view of our above holding regarding plaintiff's contributory negligence as *Loescher* recognizes that liability can be avoided by a showing that the damage was caused by the fault of the victim." *Supra.*, page 711.

The *American Road Insurance Company v. Montgomery* decision, 354 So. 2d 656 (La. App., 1977), also dealt with an injury arising under Civil Code Article 2317 with an asserted defense of the plaintiff's contributory negligence. In that case, one of the plaintiffs was denied recovery upon a finding by the Court that her negligence was a substantial cause of the accident.

For the foregoing reasons, Dixilyn Corporation submits that the defense of contributory negligence of the plaintiff was proper and appropriate in this matter and that the plaintiff, under the prevailing law of Louisiana, is barred from recovery. The United States Court of Appeals for the Fifth

Circuit failed to correctly apply the law of Louisiana to the facts of this case, but rather expanded Louisiana Jurisprudence and deprived Dixilyn Corporation of its defense. Therefore, Dixilyn Corporation respectfully submits that its "Petition for Writ of Certiorari" be granted.

Respectfully submitted:

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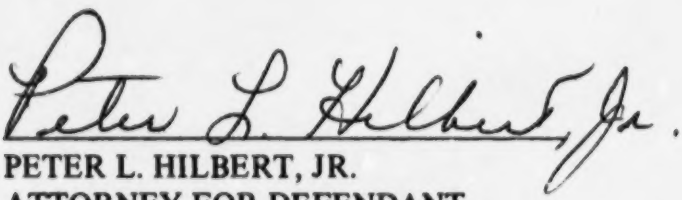
CERTIFICATE OF SERVICE

I, Peter L. Hilbert, Jr., a member of the bar of the United States Supreme Court, do certify that service of three copies of this Petition for Writ of Certiorari was made by mail on the plaintiff, Louis J. Rodrigue, Jr., through his counsel of record, Stanley J. Jacobs, Esq., at Suite 200, 500 St. Louis Street, New Orleans, Louisiana 70130, and Carl J. Schumacher, Jr., Esq., 1106 Arabella Street, New Orleans, Louisiana 70115, all in accordance with Rule 28, Paragraph 3 and Rule 19, Paragraph 3 of the Rules of the Supreme Court of the United States, this 17th day of November, 1980.



PETER L. HILBERT, JR.
ATTORNEY FOR DEFENDANT

Louis J. RODRIGUE, Jr.,
Plaintiff-Appellant,

v.

DIXILYN CORPORATION,
Defendant-Appellee,

Placid Oil Company, Defendant.

No. 78-2654.

United States Court of Appeals, Fifth Circuit.

July 3, 1980.

Worker who was injured when he fell through hole in walkway of drilling platform brought action against woner of the platform. The United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., entered judgment on verdict in favor of owner of the platform and worker appealed. The Court of Appeals, Tate, Circuit Judge, held that: (1) under Louisiana law, worker's contributory negligence was not defense to an action based on strict liability; (2) evidence would not have supported a finding of assumption of risk; and (3) error in instructing the jury that contributory negligence was a defense to an action of strict liability was plain error.

Reversed and remanded.

1. Negligence key 135(1)

Evidence that worker came on duty on drilling platform at approximately 10:30 p. m. and that, at 1:00 in the morning, he was injured when he fell through a hole in a walkway which was only semilighted did not show assumption of risk.

2. Federal Courts key 630

Plain error rule may apply even if instruction requested by the party complaining on appeal shared the same mistaken legal assumption as the complained of instruction which was actually given.

3. Federal Courts key 630

To merit reversal on the basis of plain error, appellant must establish that the instruction was an incorrect statement of law and that it was probably responsible for an incorrect verdict, leading to substantial injustice.

4. Federal Courts key 630

Where jury finding of contributory negligence would preclude any recovery on the part of the plaintiff and where the alleged contributory negligence of the plaintiff was the only defense to strict liability available in light of the answers which the jury gave to individual interrogatories, trial court's incorrect statement that contributory negligence was a defense to a strict liability action led to an incorrect verdict and substantial injustice and thus constituted plain error.

5. Negligence key 10

Basis of negligence liability is conduct that creates an unreasonable risk of injury to others; to be liable, defendant must have known or should have known of reasonable risk created.

6. Products Liability key 9

Under Louisiana strict liability law, defendant may be held liable for damages caused by vices or defects in things for which he is responsible, whether or not he knew or should have

known of the unreasonable risk of injury he thus created or maintained. LSA - C. C. art. 2317.

7. Products Liability key 15

Under Louisiana law, in order to provide a basis for defending claim of strict liability, victim's fault must be in the nature of an independent and superseding cause of his damages not imputable to the defendant. LSA - C. C. art. 2317.

8. Products Liability key 27

Under Louisiana law, the contributory negligence of the plaintiff is not a defense to an action predicated on strict liability. LSA - C. C. art. 2317.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, FAY, and TATE Circuit Judges.

TATE, Circuit Judge:

The plaintiff, Louis J. Rodrigue, Jr., was injured while working offshore when he fell through a hole in a drilling rig owned by the defendant Dixilyn Corporation. He sues Dixilyn, urging both negligence and strict liability as theories of recovery. The jury found the hole in Dixilyn's rig to be an unsafe and dangerous condition and, additionally, found both plaintiff and defendant to be negligent. In accord with jury instructions which had indicated that contributory negligence on the part of the plaintiff that proximately caused his injury would relieve the defendant under ***both*** negligence and strict liability theories of liability, judgment was rendered for the defendant Dixilyn. On appeal, the plaintiff argues that the

jury was erroneously instructed that under Louisiana law contributory negligence would be a defense to strict liability for damage occasioned by a defective thing under Civil Code Article 2317. We agree with the plaintiff's contention, and we therefore reverse and remand.

I

The accident occurred about 1:00 a. m. on a level of Dixilyn's drilling rig that the day before had been transferred to a drilling platform owned by another company (Placid). The plaintiff Rodrigue, an employee of the owner (McDermott) of a drilling crane assisting in the operation, fell though a small (3' x 4') unguarded hole cut out in the walkway grating around the large center hole used for the drilling pipe. 1/ He suffered injuries when he fell to the floor of the next level. Rodrigue, who had come on duty at 10:30 p. m., had not previously had the opportunity to observe the area. That the opening through the floor was unusual and not-to-be-expected is partially corroborated by the circumstance that, immediately after Rodrigue fell through it, a co-worker also fell into it while using the walkway. (Fortunately, the latter caught the edges of the hole and was able to avoid falling to the deck below.) The jury finding that the open hatch or hole created a dangerous condition is clearly supported by the evidence.

1/ In the discovery depositions it is indicated that the hole in the walkway had been cut for purposes of installing a stairway to the level below. However, when the plaintiff fell through the hole, no stairway had been installed, and there was no hatch or warning to protect pedestrians from the risk of not noticing it and falling through.

At the time of the accident, the floor was in darkened or (as the district court's questioning educed) semi-lighted condition. Dixilyn's primary defense as to any strict liability for damages resulting from Rodrigue's fall is that Rodrigue was contributorily negligent in proceeding to work in an area that was not illuminated.

[1] Evidence in the record may support the jury finding that Rodrigue himself was contributorily negligent (and thus barred from recovery) - e. g., he proceeded on the walkway despite the lack of illumination, or with possibly insufficient care under the circumstances of inadequate illumination. Thus, if contributory negligence 2/ were a bar to recovery, we might be required to affirm the denial of recovery. On the other hand, if instead only Rodrigue's assumption of the risk 3/ will defeat his recovery, Rodrigue should have recovered under the findings of the jury, since the facts reflected by the record do not show any basis for Rodrigue's subjective knowledge of

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2/ *See Smolinski v. Taulli*, 276 So. 2d 286, 290 (La. 1973):

> **Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection. . . . The standard of conduct to which the plaintiff must conform for his own protection is that of a reasonable man under the circumstances.**

3/ *See Prestenbach v. Sentry Insurance Co.*, 340 So. 2d 1331, 1335 (La. 1976):

> **In order for a plaintiff to assume a risk, he must knowingly and voluntarily encounter the risk which causes his injury. . . .**
> **"Knowledge" is the mainstay of this defense, and it must be proved by a preponderance of the evidence. . . .**
> **[F]or purposes of a knowing assumption of risk, we impute knowledge to a plaintiff, not because he was in a position to make certain observations, but only when he actually makes those observations and, from them, should reasonably have known that a risk was involved.**

or appreciation of the risk so as to constitute his assumption of it. As summarized by Louisiana's Professor Crowe: "The essence of assumption of the risk is twofold: first, knowledge and appreciation of a danger, and second, a voluntary encountering of it. The essence of contributory negligence is simply carelessness" Crowe, The Anatomy of a Tort, 22 Loyola (La.) L. Rev. 903, 915 (1976). See also F. Stone, 12 Louisiana Civil Law Treatise: Tort Doctrine, Section 51 (1977).

II

The trial judge instructed the jury that an owner-custodian of a thing may be held liable for damage caused by a defect in the thing, despite the absence of negligence or intent. According to the judge, "[t]he liability arises from [the custodian's] legal relationship to the object, whose defect created an unreasonable risk of inury to others." Upon concluding his instructions on possible bases of liability, the judge broached the subject of defenses: "If you find that Dixilyn was either negligent in the breach of its duty or ***at fault as the custodian of the rig,*** . . . it is necessary for you to consider the defense of Dixilyn that the plaintiff himself was guilty of contributory negligence. . . . In a case of this kind proof by the defendant by a preponderance of the evidence of ***any negligence*** on the part of the plaintiff which was a proximate cause of the accident bars the plaintiff's recovery as a matter of law, ***even though the defendant*** may also be found to have been negligent or ***at fault as the custodian of the rig*** in question." (Emphasis added.)

The plaintiff did not object to these instructions at trial, but he now claims that they are incorrect statements of the Louisiana law insofar as they indicate that contributory negligence would exonerate a defendant from strict liability for damage caused by a defect of a thing for which he was responsible. The plaintiff asks the court to apply the plain error doctrine to permit him to hrudle the Rule 51 barrier to such belated objection to the instructions.

On several occasions this court has reversed on the basis of erroneous jury instructions that without objection had been given at trial. *Jamison Co., Inc. v. Westvaco Corp.*, 526 F. 2d 922 (5th Cir. 1976); *Industrial Development Board of Town of Section, Ala. v. Fuqua Industries, Inc.*, 523 F. 2d 1226 (5th Cir. 1975); *Sheppard Federal Credit Union v. Palmer*, 408 F. 2d 1369 (5th Cir. 1969); *Chagas v. Berry*, 369 F. 2d 637 (5th Cir. 1966), *cert. denied*, 389 U. S. 872, 88 S. Ct. 161, 19 L. Ed. 2d 154 (1967); *Mondshine v. Short*, 196 F. 2d 606 (5th Cir. 1952); *Dowell, Inc. v. Jowers*, 166 F. 2d 214 (5th Cir. 1948); *see generally*, 9 C. Wright and A. Miller, Federal Practice & Procedure §2558, p. 672 (1971). In each case, we have been unwilling to perpetuate, by reason of the Rule 51 4/ contemporaneous objection requirement, a miscarriage of justice resulting from an instruction based on fundamental error; we therefore invoked the plain error doctrine to correct the mistake made by court and counsel below.

[2] The doctrine is not a routine bypass to Rule 51, however. The criterion for application of this doctrine is "certainly not whether [this] court approves or does not disapprove the results of the case." *Sheppard Federal Credit Union v.*

4/ **Federal Rule of Civil Procedure 51 provides:**

> **At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.**

Palmer, 408 F. 2d at 1371. Plain error is found, however, if "the deficient charge is likely responsible for an incorrect verdict which in itself creates a substantial injustice." *Jamison Co., v. Westvaco Corp.*, 526 F. 2d at 933, 5/

[3, 4] To merit reversal on this point, therefore, the plaintiff must establish that the instruction was an incorrect statement of law and that it was probably responsible for an incorrect verdict, leading to substantial injustice. Under the pre-comparative negligence Louisiana law, 6/ a jury finding of contributory negligence in a tort suit precludes any recovery on the part of the plaintiff. Furthermore, the alleged contributory negligence of this plaintiff appears to be the only defense to strict liability under Article 2317 available in light of the answers of the jury to the individual interrogatories in

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5/ The plain error rule may apply in such circumstances, even if an instruction requested by the now-complaining party (but not given) shared the same mistaken legal assumption. *Wirtz v. International Harvester Company*, 331 F. 2d 462 (5th Cir. 1964). In the present instance, the plaintiff's requested charges 37 and 38, if given, would have indicated that contributory negligence could defeat his strict liability claim, and the plaintiff's counsel did not recognize the error in the court's instruction until his motion for judgment notwithstanding the verdict or alternatively for a new trial.

6/ Subsequent to the accident here sued upon, the 1979 Louisiana Legislature enacted in Act 431 a pure form of comparative negligence to govern those cases in which "contributory negligence is applicable to a claim for damages." Civil Code Article 2323, as amended in 1979 La. Acts No. 431, effective August 1, 1980. *See generally, Symposium: Comparative Negligence in Louisiana*, 40 La. R. Rev. 289 (1980).

this case. 7/ Thus, if the trial judge incorrectly stated the applicability of contributory negligence as a defense to Article 2317 strict liability, the instruction led to an incorrect verdict and the substantial injustice of no recovery to the injured plaintiff despite his clear entitlement to same. 8/

III

[5, 6] Article 2317 of the Louisiana Civil Code provides: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by . . . things which we have in our custody . . . ." In 1975, reversing prior jurisprudence to the contrary, the Louisiana Supreme Court held that this article created strict liability for damage caused oy defects in a thing. *Loescher v. Parr*, 324 So. 2d 441 (La. 1975). The court held that, by reason of the responsibility imposed by this code article, the custodian or owner of a thing is responsible for damages caused through a vice or defect of the thing, without personal negligence on his part - "legal fault . . . being based upon the breach of his legal obligation to keep his thing

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7/ The jury found in answer to interrogatories numbers one through four, that the plaintiff fell through an open hatch or hole, other than the drill hole, in the skid mat of Dixilyn's rig. If found that this hole created an unsafe or dangerous condition on the rig and that such condition was not created by anyone else. The judge's instruction equated an unsafe condition with the defect required for liability under Civil Code Article 2317. See Part III of opinion, *infra*.

8/ In a third circuit FELA case in which no evidence of contributory negligence had been presented, the court stated: "[I]n rare instances, where fundamental error occasions a miscarriage of justice, this court will notice such error despite counsel's failure to comply with Rule 51. . . . Allowing the jury to speculate on contributory negligence and thereby possibly to diminish the compensation recoverable, under the circumstances of this case, was a miscarriage of justice." *Paluch v. Erie Lackawanna Railroad Company*, 387 F. 2d 996, 1000 (3rd Cir. 1965).

in such condition or such control that it does no damage to others." 324 So. 2d at 447-48. A vice or defect of the thing is a condition which causes an "unreasonable risk of injury to another", and the "fault [of the person responsible for the thing] rests upon his failure to prevent the risk-creating harm and upon his obligation to guard against the condition" that creates the unreasonable risk of injury to others. 324 So. 2d at 446-47.9/

In recognizing the Article 2317 strict liability rule, the court also noted the available defenses, which are likewise applicable to other strict liability causes of action - liability may be avoided only by proof that the damage was caused by (a) the fault of the victim, (b) the fault of a third person, or (c) an irresistible force. 324 So. 2d at 445, 449. In *Loescher*, only the latter defense was at issue; in rejecting it, the court noted that exculpation could only thereby be provided by "an irresistible cause or force not forseeable, usually a vis major or act occasioned exclusively by the violence of nature without the contribution by legal fault of any human being." 324 So. 2d 449. Subsequently, in explaining the fault of a third person that

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9/ The basis of negligence liability is conduct that creates an unreasonable risk of injury to others, Restatement (2d) of Torts, Section 282 (1965), but (unlike in cases imposing strict liability) to be liable the defendant must have known or should have known of the unreasonable risk thus created. *id.*, Sections 284, 289-91. Thus, although the creation or maintenance of an unreasonable risk of injury to others is a central basis for liability under either negligence or strict responsibility, in strict liability (unlike in negligence-based actions) the defendant may be liable for damages caused by vices or defects in things for which responsible under the Louisiana Civil Code, whether or not he knew or should have known of the unreasonable risk of injury he thus created or maintained. *Loescher v. Parr, supra; Holland v. Buckley*, 305 So. 2d 113 (La. 1974).

that might exculpate the custodian or owner of the similar strict liability under Article 2322, the Louisiana Supreme Court explained, in rejecting a defense on this ground, *Olsen v. Shell Oil Co.*, 365 So. 2d 1285, 1293 (1979):

> The fault of a "third person" which exonerates a person from his own obligation importing strict liability as imposed by Articles 2317, 2321, and 2322 is that which is the sole cause of the damage, of the nature of an irresistible and unforeseeable occurrence - i. e., where the damage resulting his no causal relationship whatsoever to the fault of the owner in failing to keep his building in repair . . .

[7, 8] In *Loescher* and *Olsen* the Louisiana court did not have occasion to address the issue of the third defense to strict liability under the Civil Code - i. e., the fault of the victim (here at issue). However, to be consistent with the stated criteria of the other two defenses, the victim's fault should be in the nature of an independent and superseding cause of his damages not imputable to the defendant, in order to absolve a defendant of its responsibility for damages caused by the defect of a thing for which he is strictly liable. (Here, the very basis of the defendant's strict liability was the unreasonable danger created to the unsuspecting or even careless passerby who might fall through the unguarded and not-to-be-expected hole in the walkway.) Moreover, authoritative guidance is provided by a decision clarifying the defense of victim fault to strict liability provided by another article of the Louisiana Civil Code. In *Langlois v. Allied Chemical Corp., Inc.*, 258 La. 1067, 249 So. 2d 133 (1971), a seminal decision in Louisiana strict-liability responsibility, the defendants urged both contributory negligence and assumption of the risk as exculpating them from strict liability; the court rejected both of these defenses, with reasoning clearly applicable to all strict-liability theories:

> The defense of contributory negligence which is urged here presupposes original negligence on the part of the defendant. This case is not a case where negligence is an ingredient of fault, and contributory negligence is not a defense. Usually, the assumption of risk doctrine will apply where the nature of the relationship of the parties appears to exact consent from the one injured to be exposed to possible harm. In such situations the plaintiff understands the risk involved and accepts the risk as well as the inherent possibility of damage because of the risk. There is some authority for rejecting assumption of risk in cases which do not involve negligence, but the majority view is that assumption of risk is a defense to strict liability. A plaintiff who with full knowledge and appreciation of the danger voluntarily exposes himself to the risks and embraces the danger cannot recover damages for injury which may occur. 249 So. 2d at 140.

As stated by Professor Ferdinand Stone in his authoritative treatise, 12 Louisiana Civil Law Treatise: Tort Doctrine, Section 439, p. 566:

> "Where the theory upon which recovery is sought is one of strict liability, either under a tort notion of implied warranty or of legal fault based on public policy, contributory negligence is not a defense, while voluntary assumption of a known risk (fault of the victim) act of a stranger and *force majeure* may be."

See also Andrus, *Strict Liability Under Civil Code Articles* 2317, 2318, 2321, 25 La. B. J. 105, 117-19 (1977); Comment, Fault of the Victim: The Limits of Liability Under Civil Code Articles 2317, 2318, and 2321, 38 La. L. Rev. 995 (1978). As we ourselves have noted, citing *Langlois* and reversing a district court for giving instructions that contributory negligence was a defense, a defendant is not exculpated by the

plaintiff victim's contributory negligence from the defendant's similar strict liability for harm caused by product defect. *Khoder v. Amf, Inc.*, 539 F. 2d 1078 (5th Cir. 1976).

The defendants refer us to language in several intermediate appellate court decisions, some of which seem to have recognized contributory negligence as a defense in Article 2317, 2318 or 2321 strict liability cases, and some of which recognize only assumption of the risk. For the most part, the former decisions are distinguishable or not squarely in point, 10/

10/ The defendant cites the following intermediate appellate court decisions as support for its argument that contributory negligence is the victim fault relieving the defendant from liability under Article 2317: *Daniel v. Cambridge Mut. Fire Ins. Co.*, 368 So. 2d 810 (La. App. 2d Cir. 1979) (which however, recognized assumption of the risk, not contributory negligence, as the defense). *Brooks v. U. S. Fidelity & Guaranty Co.*, 358 So. 2d 660 (La. App. 1st Cir. 1978); *Alfonso v. Market Facilities of Houston, Inc.*, 356 So. 2d 86 (La. App. 1st Cir. 1978); *Derouen v. Southern Pacific Transportation Company*, 351 So. 2d 300 (La. App. 3rd Cir. 1977); *Korver v. City of Baton Rouge*, 348 So. 2d 708 (La. App. 1st Cir. 1977); *Richards v. Marlow*, 347 So. 2d 281 (La. App. 2nd Cir. 1977) (assumption of risk applies); *Parker v. Hanks, 345 So. 2d 194 (La. App. 3rd Cir. 1977); Panek v. Gulf Insurance Company*, 341 So. 2d 46 (La. App. 3rd Cir. 1977) (only fault of a third person exonerated a defendant from strict liability).

We do not consider these decisions to be convincing authority for that position and in fact note that several of them are not apposite to the case at hand. In *Daniel* for instance the victim fault found by the court was assumption of risk, not contributory negligence. *Brooks* ruled for the defendant with respect to injuries caused by defendant's calf because the plaintiff was the custodian of the calf at the time of injury. The *Alfonso* court relieved the defendant of liability because a person who "voluntarily utilizes [recreational] facilities assumes the reasonably foreseeable risks which are inherent in the use thereof." 356 So. 2d at 89. The court at no point determines that the plaintiffs had been negligent in any way. In *Derouen* the defendant was held liable and all three defenses were eliminated. In *Korver*, there was at least some indication that the crack

but to the extent that they imply that ordinary carelessness or inadvertence of a plaintiff may exonerate a strict liability defendant, they seem to be inconsistent with the law clearly pronounced by the State Supreme Court in *Langlois* and *Loescher*.

10/ Continued

in the sidewalk was so obvious that it might not have constituted a defect for purposes of Article 2317; furthermore, it is questionable whether the sidewalk would have been considered under the guard of the adjacent property owner. The victim fault which prevented liability in *Richards* was a knowing and voluntary encounter with the risk, in short, assumption of risk rather than contributory negligence.

Perhaps the strongest attempt to justify the application of contributory negligence as victim fault (though in an Article 2321 animal liability case) is made in *Parker*. The facts of this case are closely analogous to those in the two First Circuit opinions, *Dotson v. Continental Insurance Co.*, 322 So. 2d 284 (La. App. 1st Cir. 1975) and *Parks v. Paolo*, 349 So. 2d 896 (La. App. 1st Cir. 1977), which found no liability when "the offending animals were secured on the owner's premises, and the parties injured were on the premises against the wishes or instructions of the owner." *Alfonso v. Market Facilities of Houston, Inc.*, 356 So. 2d at 89. Under such circumstances, the proper analysis may be that the defective animal (or thing) did not present an unreasonable risk of harm and therefore there was no need to even consider victim conduct for a defense. It may be noted further that the opinion in *Parker* represents the reasoning of only one member of the three-judge panel. The other two judges merely concurred in the result. Finally we note that *Panek* relieved the defendant of liability on the basis of fault of the third party, not fault of the victim.

We also recognize that some Law Review commentators are of the opinion that contributory negligence constitutes victim fault for purposes of a strict liability action. *See e. g., The Work of the Louisiana Appellate Courts for the 1974-75 term* - Torts, 36 La. L. Rev. 400, 401 (1976); Comment, *Does Louisiana Really Have Strict Liability Under Civil Code Articles* 2317, 2318 and 2321?, 40 La. R. Rev. 209, 210 (1979). To some

In summary, as Professor Stone correctly concludes, contributory negligence as an affirmative defense is "properly pleaded only to an action based on negligence." Stone, *supra*, §56, p. 76. See also *Id.* §50, p. 71.

The rule that a stict liability action is not barred by the conduct of the plaintiff which amounts to no more than ordinary contributory negligence (lack of due care) is generally established in other American jurisdictions as well. Restatement (2d) of Torts, §§402A (Comment n), 523 (1965); W. Prosser, Law of Torts, §§79, 103, pp. 522, 670-71 (4th ed. 1971); 2 F. Harper & F. James, The Law of Torts §22.7, p. 1216 (1956); 46 A. L. R. 3d 240 §4, p. 248 (1972 and Supp. 1979).
This "ordinary contributory negligence" is to be distinguished from the contributory negligence that overlaps with assumption of risk - *i.* "voluntarily encountering a known unreasonable risk." Prosser, *supra* § 68, p. 441. 11/

10/ Continued

extent this mistaken impression seems to flow from court language tying the strict liability to unreasonable risk of harm caused by the child, animal or thing for whom or which the defendant is responsible. The use of language that coincides with negligence terminology does not alter the nature of strict liability for damages caused by defects in things for which under the Civil Code the owner or custodian is responsible. See note 9, supra.

We also note that Louisiana has retreated from a full application of contributory negligence even with respect to negligence liability in certain circumstances. *See, e. g., Boyer v. Johnson*, 360 So. 2d 1164 (La. 1978), *Baumgartner v. State Farm Mutual*, 356 So. 2d 400 (La. 1978); Note, *Abrogation of the Contributory Negligence Bar in Cases of Disparate Risks*, 39 La. L. Rev. 637 (1979).

11/ The increasingly widespread abrogation of the total bar of contributory negligence in favor of the mitigation of comparative negligence has resulted in some re-thinking of the traditional rule that contributory

It is apparent from the jury's answers to its interrogatories, 12/ read in the light of the trial judge's instructions, that the defendant Dixilyn is liable under Civil Code Article 2317 for the injuries to the plaintiff Rodrigue occasioned by its defective drilling rig. The evidence supported at most only the plaintiff's ordinary contributory negligence, *i. e.*, inadvertence in failing to discover or protect himself against the possibility of the defect, conduct that will not relieve the defendant of liability. Accordingly, we reverse and remand for trial to assess damages.

REVERSED AND REMANDED.

11/ Continued

negligence does not affect the strict liability plaintiff's recovery. A trend toward allowing such conduct to reduce recovery is developing. *See, e. g., West v. Caterpillar Tractor Co.*, 547 F. 2d 885 (5th Cir. 1977); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P. 2d 42 (Alaska 1976); *Hagenbauch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972). We need not (and indeed could not) now decide, however, that such a movement will occur in Louisiana with the advent (subsequent to the present accident) of comparative negligence. *See*, Plant, *Comparative Negligence and Strict Liability*, 40 La. L. Rev. 408 (1980). For the present controversy, it is sufficient to determine that Louisiana law does not classify the ordinary contributory negligence identified in the court's jury instructions as fault of the victim for purposes of exonerating a strict liability defendant under Civil Code Article 2317.

12/ See footnote 7 *supra*.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2654

D. C. Docket No. CA-76-1236 "D"

LOUIS J. RODRIGUE, JR.,
Plaintiff-Appellant,

VERSUS

DIXILYN CORPORATION,
Defendant-Appellee,

PLACID OIL COMPANY,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana
Before WIDSOM, FAY and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is herebv. reversed: and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

July 3, 1980

ISSUED AS MANDATE: Aug. 28, 1980
REISSUED AS MANDATE: Nov. 6, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-2654

Filed August 20, 1980

LOUIS J. RODRIGUE, JR.,
Plaintiff-Appellant,

VERSUS

DIXILYN CORPORATION,
Defendant-Appellee,

PLACID OIL COMPANY,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING
August 20, 1980

Before WIDSOM, FAY and TATE, Circuit Judges.
Per Curiam:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED.**

ENTERED FOR THE COURT:

Judge Tate /s/
United States Circuit Judge